

SUPPORTING EXPRESSION FROM THE FRONTLINE

Tips for library staff navigating
first amendment issues

Welcome!

Clare D. Membiela, MLS, J.D.

membielc@michigan.gov

517-335-8132



LIBRARY OF MICHIGAN

Disclaimer

The research, resources and discussion that are part of this presentation are for informational purposes only and not for the purpose of providing legal advice. You should *contact your attorney to obtain advice with respect to any particular issue or problem.*



So, What's going on?

- Book challenges and censorship attempts up at least 70%
- Challenges are often organized and aggressive.
- Fostered and nurtured via social media by non-profit groups like The Heritage Foundation, Moms for Liberty, No Left Turn in Education, and local off-shoots of these.
- Proponents of challenges are educated and well-funded. Using political advocacy and social media to gain local footing.
- Tactics similar to pandemic anti-masking and anti-restriction. Many groups are ones that have pivoted from COVID related protests to censorship.
- Rooted in anti-CRT, anti DEI, anti LGBTQ+ beliefs.

Book Challenges are not the only issue

- First Amendment Audits
- Bills limiting instruction of history or social studies perspectives involving CRT, DEI, and LGBTQ+
- Laws and bills that change the way digital materials can be searched and utilized by schools and libraries.
- Laws changing the way libraries appoint boards or receive funding.
- Lawsuits involving materials alleged to be obscene.
- Local ordinances and practices giving parent committees control over acquisition decisions.
- Support for and utilization of laws that would make teachers and librarians criminally liable for material checked out by minors.

Other First Amendment Issues

- Library Access
 - Marginalized communities
 - Disabled
 - Teens
- Social Media Accounts
 - Library-owned accounts
 - Staff personal accounts
- Library Patron Policies
 - “Hate Speech”
 - Hidden (or overt) Bias
 - Punishment for violation
 - Bans
- Photography Policies

How does this affect me?

- Rhetoric changes inspired by political polarization can affect tone of discourse on issues.
- Non-stop social media marketing and misinformation.
- Community anxiety and frustration
- Loss of societal “niceties” (People more insular and factional)
- Anger and frustration boils over into everyday interactions.
- Negative interactions more frequent
- Demonstrated fear and opposition to communities you may belong to

Tips for Managing Library Services & Protecting First Amendment Rights

Knowledge

Policies

Training

Communication

Self-Care

KNOWLEDGE

- Helps manage fear and anxiety
- Facilitates logical judgment and decision making
 - Especially on the fly or in unexpected situations.
- Can inspire innovation and problem solving

BUT.. Also needs context and an understanding of the boundaries.



Library Establishment

- Laws enacted that permit municipalities to establish public libraries
- 6 Public Acts for 9 establishment types:
 - 3 City Library Types
 - 3 Township Types (1 no longer active)
 - 1 School/Public
 - 1 District
- Different laws provide varying board powers, municipal autonomy, and funding options.

NOT ALL PUBLIC LIBRARIES ARE LEGALLY THE SAME



Government Entities

- Michigan Libraries are GOVERNMENT ENTITIES established by municipalities and funded by tax dollars.
- Public Library Directors and Staff are public employees.
- Public library boards are public officials.
- Public Libraries are bound by ethical and Constitutional requirements that may not apply to other governmental and non-profit entities.



U.S. Constitution Amendment I

Congress shall make no law respecting an **establishment of religion**, or **prohibiting the free exercise thereof**; or abridging the **freedom of speech**, or of the **press**; or the **right of the people peaceably to assemble**, and to **petition the government for a redress of grievances**.

The First Amendment & Public Libraries

- Supreme Court Case *Martin v. City of Struthers* Ohio established that the First Amendment includes the right to receive and distribute information.
- *Kreimer v. Bureau of Police for Town of Morristown* (Federal Circuit Court case, 3rd Cta) established a connection between the First Amendment Right to Information and Public Library Access
- Libraries are generally public or governmental entities so First Amendment rights must be upheld

How this affects Public Libraries



Public Forums



Limited or Designated Public



Non-Public Forums



Libraries are Limited Public Forums



Can implement “Time, Place and Manner” Restrictions.



Restrictions may not be based on content speech.



Rules can limit activity- including First Amendment expression- if activity disrupts use of the forum for its intended purpose. Can also be used to facilitate intended purpose.



In other words, a library can limit first amendment activities that are not in keeping with the purpose of the library



Libraries are “Limited Public Forums”

Can implement “reasonable” “Time, Place & Manner” rules and regulations.

Rules must be tailored to promote the library’s mission and purpose.

Rules must be “content neutral.”

Rules must be evenly enforced.

Exceptions to First Amendment

- Defamation
- True Threat
- Incitement
- Fighting Words
- Obscenity

And....

- **Obscenity** – Probably the most misunderstood exemption. Miller v. California, 413 U.S. 15, 24, (1973)
 - (a) whether ‘the average person, applying **contemporary community standards**’ would find that the work, taken as a whole, appeals to the **prurient interest**, (“Prurient” = arouses sexual desire).
 - (b) whether the work depicts or describes, in a **patently offensive way**, **sexual conduct specifically defined by the applicable state law**;
and
 - (c) whether the work, **taken as a whole, lacks serious literary, artistic, political, or scientific value.**

A Note about Hate Speech:

- US Courts generally consider “hate speech” protected under the first amendment unless the speech falls within one of the categories of unprotected speech (True Threat, Fighting Words, Inciting Words, Obscenity, Defamation). Each of these categories has elements that usage would need to meet to fall under that category.
- However, Speech is protected, actions are not. Consider the difference between a group of people using a meeting room to calmly discuss shared controversial and hateful views, and one patron who yells a derogatory term at another patron. Could either of these be prohibited?

Obscenity v. Pornography

- Obscene materials are illegal.
- Pornography is legal.
- Pornography is not well defined in the law.
- Specific statutes may define pornography for purposes of that law. Some of those laws may be decades old.
- Interpretation can evolve with cultural norms.
- All obscenity is pornography but not all pornography is obscenity.
- Only a court can legally label something as “Obscene.”

Children and the First Amendment

- Minors have a right to receive information subject to certain restrictions that can be implemented by schools, or legislation as long as those restrictions are protecting children from a demonstrated harm or are related to a compelling government interest (such as the interest in keeping children safe from obscenity or maintaining an appropriate curriculum).

Public Libraries are not “In Loco Parentis”

...Generally

Libraries have a standard (“duty”) of care owed patrons and visitors, but have no specific responsibility towards children

Individual city officials and employees had no duty to child who drowned in city-owned outdoor swimming pool, absent allegation of special relationship or other special circumstance that would have created such duty with respect to child; any duty owed was for benefit of general public. Summers v. City of Detroit (1994)

BUT

Certain situations and scenarios can affect this

Negligence

Policies/programs that provide assurances or understanding of care beyond typical library service

What are Materials Challenges? Materials Reconsiderations?

- The inquiry into materials held/chosen by the library.
- Programing can be included too.

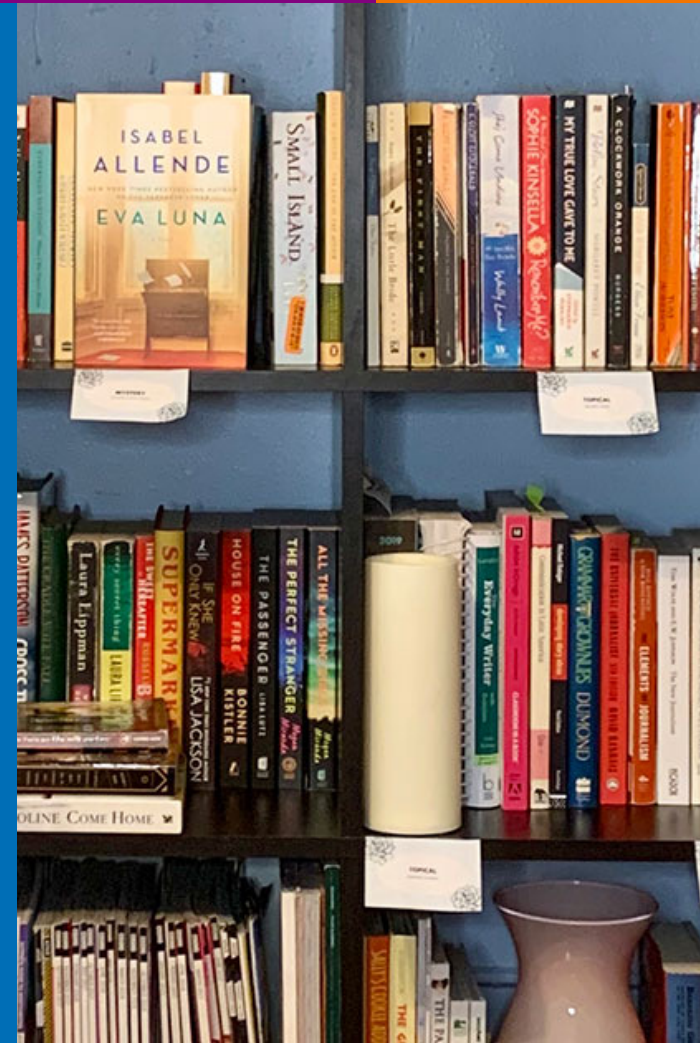
This process causes the library to review the purpose that the material/program has in the collection and whether the material was acquired in accordance with the library's Collection Development Policy.

A challenge or questioning of material does not require that the library do anything different with the material challenged unless the library determines action is needed.

POLICIES

Good Policies Are:

- Necessary
- Clear
- Legal
- Enforceable



So....

Library Policies and the enforcement of them must be balanced against the Constitutional, statutory, and regulatory requirements in place.

Administration and Staff cannot assert their personal beliefs or faith on library users.

If eligible for services, patron must be served the same regardless of beliefs, speech, interests w/few exceptions.
(Obscenity, Threat)

Policy Enforcement Tips

- Regular, consistent, and updated training
- Policies are easily accessible and /or posted for public notice.
- Policy changes are widely announced
- Supervisors ensure that policies are enforced consistently across all departments and branches
- Enforcement procedures are DEI informed and consider the demographics of the community

Note

- It is ok to question library materials.
- It is ok to question policies and processes.
- Policies can regulate behavior, but not speech.
- Keep personal viewpoints, politics, etc. separate from work.
- Know and adhere to your library's social media policy
 - Be cautious on personal accounts-keep it personal.
- Know and adhere to your library's crisis communication policy
 - Communications to media
- Communicate with administration
 - Keep a unified front
- Treat all patrons equally
- Know where to draw the line- staff have the right to walk away from abusive situations.
- Know library's security policy

Training

- Regular
- Varied
- Targeted
- Proactive



Recommended Areas of Training

- Policies
 - Social Media
 - Employee
 - Security
 - Patron Behavior
 - Children
 - Materials Reconsideration
- Enforcement
 - DEI concerns
- De-escalation
- Conflict Management

Communication

- ASK
- POST/NOTICE
- SPEAK
- DOCUMENT
- LISTEN



Self-Care

- Communicate to supervisors
- Communicate with peers
- Take available time away
- Walk away when necessary
- Know options for assistance
 - USE THEM



IN SUM..

- Tips for managing Materials Challenges.
- Training Resources
- Additional Assistance
- More information



Tips for Handling a Materials Challenge

BEFORE

- Seek out de-escalation and conflict resolution training
- Know existing policy
- Know enforcement protocols

DURING

- Maintain normal customer service protocol
- Follow existing policy
- Make patron aware of policy
- Remain calm & neutral
- Communicate
- Know when to stop

Tips for Managing First Amendment Audits

- Be friendly and ignore auditors filming if possible.
- Understand that personal ideas about privacy may not apply, and there is not one “right” procedure for handling audits.
- Remain calm and professional.
- If behavior is harassing, implement procedures to handle problem patrons- address behavior – not speech.
- Call law enforcement for support as last resort- but definitely call if threatened.



Training Resources

- [Niche](#)
- [WebJunction](#)
- [Library of Michigan](#)
- [MLA](#)
- [MCLS](#)
- [Transforming Teen Services](#) Workshops (Nov 2022)
- [Public Libraries: A Vital Space for Family Engagement](#)
- [Ideabook: Libraries for Families](#)
- Library Services Competencies for Children and Teens
 - [ALSC Competences](#)
 - [YALSA Competences](#)
- MeL: [Resources & Training for Library Staff](#)

Additional Assistance

- Internal HR or employee assistance resources
 - Through library cooperative
 - Through health insurance
- MLA
- ALA
- Local community mental health resources
 - [Municipal](#)
 - [State supported](#)
- [MSU extension – wellness programs](#)
 - [Mindfulness classes](#)
- [Stress Coping via UM](#)
- [Resources for LGBTQ+ staff](#)

Resources

- <https://www.masc.sc/Pages/newsroom/uptown/January-2020/Keeping-Calm-With-First-Amendment-Audits.aspx>
- <https://firstamendmentwatch.org/deep-dive/controversial-first-amendment-auditors-test-the-right-to-film-in-public-spaces/#tab-analysis-opinion>
- <https://www.maine.gov/msl/libs/documents/FirstAmendmentAudits.pdf>
- <https://americanlibrariesmagazine.org/2020/01/02/free-speech-free-for-all-first-amendment-audits/>
- <http://www.dmlp.org/legal-guide/recording-police-officers-and-public-officials>



Resources

- <https://www.oif.ala.org/oif/?p=18859>
- <https://www.libraryjournal.com/?detailStory=OIF-Examines-Legal-Issues-for-Library-Social-Media-and-First-Amendment-Audits-ALA-Midwinter-2020#:~:text=Libraries%20are%20beginning%20to%20be,as%20taxpayers%20and%20citizen%20journalists.>
- <https://www.masc.sc/Pages/newsroom/uptown/January-2020/Keeping-Calm-With-First-Amendment-Audits.aspx>
- <https://www.cirsa.org/news/first-amendment-audits-coming-to-your-town/>
- <https://www.railslibraries.info/sites/default/files/Sample%20Library%20Filming%20Policy%204837-0093-3772%20v.2.pdf>



Thank You!

Clare D. Membiela, MLS, J.D.

membielc@michigan.gov

517-335-8132



LIBRARY OF MICHIGAN